

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of)	
)	
Application by)	
Qwest Communications International, Inc.)	WC Docket No. 03-11
for Authorization to Provide In-Region,)	
InterLATA Services in the States of)	
New Mexico, Oregon and South Dakota)	

COMMENTS OF SPRINT COMMUNICATIONS COMPANY L.P.

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Sprint Communications Company L.P. opposes the above-captioned application of Qwest Communications International, Inc. for authorization to provide in-region, interLATA services in New Mexico, Oregon and South Dakota.¹ The public interest requires that the Application be denied unless the Commission is convinced that the local markets have been opened fully and irreversibly to competitive entry. In Sprint's view, this is not yet the case.

I. INTRODUCTION AND SUMMARY

A. Introduction

A key purpose of the 1996 amendments to the Communications Act of 1934 (the Act) was to open the local market to competition. To that end, Congress envisioned three avenues of local entry: resale, use of incumbent LEC unbundled network elements and facilities-based competition; and it placed incumbent LECs in the rather unnatural role of

¹ Consolidated Application by Qwest Communications International Inc. for Authority to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11 (filed January 15, 2003) (Application).

assisting their would-be competitors by imposing the interconnection, resale, unbundling and collocation obligations of § 251(c).

To encourage the principal ILECs – the BOCs – to cooperate in this process, Congress enacted the “carrot” of § 271, giving the BOCs the right to enter the interLATA long distance market in-region once their local markets were truly open. The Commission recognized the importance of local market competition in one of the first applications it decided under this section.

Although Congress replaced the MFJ’s structural approach, Congress nonetheless acknowledged the principles underlying that approach that BOC entry into the long distance market would be anticompetitive unless the BOCs’ market power in the local market was first demonstrably eroded by eliminating barriers to local competition. *** In order to effectuate Congress’ intent, we must make certain that the BOCs have taken real, significant and irreversible steps to open their markets. We further note that Congress plainly realized that, in the absence of significant Commission rulemaking and enforcement, and incentives all directed at compelling incumbent LECs to share their economies of scale and scope with their rivals, it would be highly unlikely that competition would develop in local exchange and exchange access markets to any discernable degree.²

If the BOCs are allowed to enjoy the § 271 “carrot” before local competition is fully and irreversibly established, they will have little incentive to cooperate with competitive LECs thereafter, unless they are subject to continuing regulation. Successfully maintaining such a regulatory structure and adapting it to changes in technology will require significant on-going resources of both the Commission and interested parties, with, at best, uncertain results. It would be far preferable to withhold the § 271 “carrot” until local competition is sufficiently entrenched that competitive forces can supplant the intensive regulation and enforcement that otherwise would be required. Sprint does not

² Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, 12 FCC Rcd 20543, ¶18 (1997) (Michigan Order).

believe that point has yet been reached in the states of New Mexico, Oregon and South Dakota for which Qwest is seeking § 271 authorization.

The public interest inquiry should focus on competition in the local market. In the decision of the Court of Appeals for the District of Columbia concerning the FCC's grant of SBC's 271 application for long distance service in Kansas and Oklahoma remanding the "price squeeze" issue,³ the court commented on the Commission's inadequate consideration of the appellants' claim that the low volume of residential customers in these states and SBC's pricing which does not provide enough margin to make competition profitable are evidence of a "price squeeze" that is inconsistent with the public interest. The court stated: "Here, as the Act aims directly at stimulating competition, the public interest criterion may weigh more heavily towards addressing potential 'price squeeze.'" *Id.* at 555. Clearly, the court considers the Act's goal of "stimulating competition" to refer to competition in the local market, the market adversely affected by a "price squeeze." Thus, it is appropriate to consider whether the dismal state of competition and the low volume of residential customers served by facilities-based competitors is in the public interest when evaluating a § 271 application.

B. Summary

As shown below, the CLEC industry remains under financial pressure. The past year has been marked by the collapse of several major CLECs and a severe tightening of capital to would-be entrants. Further, the regulatory environment is now in a state of uncertainty as a result of the recent decision of the D.C. Circuit Court of Appeals on UNE

³ Joint Application by SBC for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, 16 FCC Rcd 6237 (2001), remanded, Sprint Communications Co. L.P. v. FCC, 274 F. 3d 549 (DC Cir. 2001).

standards.⁴ Uncertainty now reigns concerning whether or not the Commission will reduce the RBOCs' UNE and line sharing obligations, creating even more business uncertainty for the competitive industry.

Further evidence of the dismal state of competition is the fact that the RBOCs have failed to establish themselves outside their territory. The low market shares for CLEC residential customers indicate that competition has not been firmly established, particularly in New Mexico and Oregon. Finally, in its analysis of CLEC market shares, Qwest's data appear to be inflated by the improper inclusion of data products and one-way lines.

II. THE CLEC INDUSTRY REMAINS UNDER FINANCIAL PRESSURE (PUBLIC INTEREST)

The past two years have been marked by the bankruptcy of many of the CLECs that were in the vanguard of the industry: Adelphia Business Solutions, ART, Birch, Convergent, Covad, e-Spire, ICG Communications, Metropolitan Fiber Networks, McLeodUSA, Mpower, Net2000, Network Plus, NorthPoint, Rhythms, TeleGlobe, Teligent, Viatel Holding, Williams Communications Group, WinStar and XO Communications, to name a few.⁵ WorldCOM, which claims to be the largest CLEC in the U.S. in addition to providing long distance services,⁶ reported financial

⁴ United States Telecom Association v. Federal Communications Commission, 290 F.3d 415 (D.C.Cir. 2002)(petitions for certiorari pending)("USTA").

⁵ A number of CLECs have emerged from bankruptcy, including Birch, Covad, McLeodUSA and XO.

⁶ See Statement of Victoria D. Harker before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, June 19, 2002.

misrepresentations and was forced into bankruptcy in July 2002. The number of CLECs has decreased from approximately 330 at the end of 2000 to fewer than 80 today.⁷

The bleak state of the industry is making it difficult for the surviving CLECs to obtain capital to expand their facilities. Given the current high risk associated with the CLEC industry, any financing that can be obtained comes at a high price. In the telecom industry, capital spending decreased by 25 percent in 2001 and was expected to be another 20 percent lower in 2002. *Id.*

In addition to these financial hurdles, CLECs now face regulatory uncertainty concerning the availability and pricing of UNEs. In its *USTA* opinion, the D.C. Circuit addressed the RBOCs' appeals of the FCC's UNE Remand decision⁸ in which the FCC reviewed its definition of "impair" and other unbundling criteria and its list of UNEs in light of the Supreme Court's decision in *Iowa Utilities Board*. The court remanded the Commission's UNE Remand Order in an opinion that displayed some hostility towards UNE-based competition, despite the Supreme Court's recognition, just a few days earlier, that the Commission could set UNE rates so as to promote local competition broadly.⁹ The D.C. Circuit's decision, coming in the midst of the Commission's own UNE Review

⁷ Yochi J. Dreazen, FCC's Powell Says Telecom 'Crisis' May Allow a Bell to Buy WorldCom, *The Wall Street Journal*, A4 (July 15, 2002).

⁸ In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) ("UNE Remand Order").

⁹ Verizon Communications Inc. v. Federal Communications Commission, Nos. 00-511 *et al.* (S. Ct. May 13, 2002).

proceeding,¹⁰ creates additional uncertainty for the already troubled competitive industry. At one extreme, the FCC could decide that the RBOCs are no longer required to provision many UNEs in metropolitan areas. Since a significant portion of the competitive industry relies on UNE components, CLEC investments likely will be scaled back until the regulatory environment becomes clearer. In the interim, funding for an industry already under severe financial pressure will be extremely scarce, and what is available will be high-priced.

At a minimum, until decisions are made concerning the availability of UNEs, the Commission must pay more attention to the market shares of the competition. It is highly unlikely that the percentage will increase at the same pace as it has in recent years, given the tumult recounted above. Indeed, it is more reasonable to expect that the market shares of competitors will shrink as the uncertainty about the availability and pricing of UNEs restricts further investments and sends additional competitors into bankruptcy.

III. OUT OF REGION RBOCs HAVE FAILED TO COMPETE AGAINST FELLOW RBOCs (PUBLIC INTEREST)

ILECs have chosen not to compete with each other for customers outside their territories. Why would this be the case? ILECs not only know the local market, but they come equipped with the complex back-office systems needed to provide service efficiently and economically. It is telling, then, that despite earlier assertions to the contrary, the RBOCs have remained largely outside the local competition fray. If local competition were truly enabled, these RBOCs, who are high on the learning curve for the

¹⁰ In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Notice of Proposed Rulemaking, released December 21, 2001.

provision of local service, would have the incentive to enter the local markets outside their serving territories with bundles of local and long distance service.

In its order approving Verizon's Section 271 application for Rhode Island, the Commission found that the lack of entry by other carriers – either out-of-region RBOC or CLEC – can be explained by factors beyond the control of the applicant, “such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors.”¹¹ This suggests that the Commission believes that the public interest considerations should only include factors within the control of the applicant. Sprint disagrees. In Sprint's view, consideration of the public interest should include all factors, whether or not they are within the applicant's control, that bear on whether the local market has indeed been irreversibly opened. The fact that the carriers which are best prepared to enter the local markets are not even attempting to do so in any market outside their local territories is indicative of some deterrent to entry and should give the Commission pause as it considers whether or not local competition is fully and irreversibly enabled.

IV. COMPETITION IN THE QWEST STATES HAS NOT BEEN FIRMLY ESTABLISHED (PUBLIC INTEREST)

As noted above, the Act allows competitors to enter the local market via three entry strategies: resale of the incumbent's network, the use of unbundled network elements, or interconnection to the incumbent's network by pure facilities-based

¹¹ In the Matter of Application of Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island, CC Docket No. 01-324, Memorandum Opinion and Order, released February 22, 2002, ¶ 106 (Rhode Island Order).

providers, or some combination thereof. The Commission has found that all three means of entry should be available:

Congress did not explicitly or implicitly express a preference for one particular strategy, but rather sought to ensure that all procompetitive entry strategies are available. Our public interest analysis of a section 271 application, consequently, must include an assessment of whether all procompetitive entry strategies are available to new entrants.

Michigan 271 Order ¶387. In discussing how it would evaluate whether all strategies are available, the Commission made clear that there should be competition in each means of providing competitive local service and to both business and residential customers:

The most probative evidence that all entry strategies are available would be that new entrants are actually offering competitive local telecommunications services to different classes of customers (residential and business) through a variety of arrangements (that is, through resale, unbundled elements, interconnection with the incumbent's network, or some combination thereof), in different geographic regions (urban, suburban, and rural) in the relevant state, and at different scales of operation (small and large).

Id. ¶391.

In its Rhode Island Order, the Commission stated that the public interest standard does not require it to “consider the market share of each entry strategy for each type of service.” ¶ 104. However, the public interest standard does require that local competition be healthy and sufficient to endure after RBOC entry. Low levels of facilities-based competition, particularly in the residential market, should signal that competitors are unwilling or unable to make a sizeable investment in the market. If competition is not fully and irreversibly enabled in that market, the RBOC will retain its monopoly control over residential customers, and its entry into the long distance market will not serve the public interest.

Although Qwest claims that meaningful competition exists in its states, competition in the residential market is generally *de minimis*. In this Application, Qwest estimates that as of October 31, 2002, Cricket Communications, a PCS provider in New Mexico that Qwest claims is “a competing facilities-based provider of local residential telephone service,” provides service to approximately 8,410 to 9,410 customers who have terminated their wireline service.¹² The number of lines Qwest attributes to Cricket equates to a market share of approximately 1.5 percent.¹³ Qwest’s estimates of 8 facilities-based listings (*id.* at 38) and of 1,033 resold access lines (*id.* at 41) produce an additional CLEC market share of about 0.2 percent. In Oregon, where CLECs have approximately 20,132 residential lines, the CLEC market share is also negligible: about 2.1 percent.¹⁴ These low percentages clearly indicate that competitors are not willing to make a sizeable investment in the residential market and that competition in this market has not been fully and irreversibly enabled.

CLEC competition, particularly in the residential market, is jeopardized by the precarious financial state of several competitors. As noted in Section II above, many CLECs have filed for bankruptcy, and capital for expansion is severely restricted and

¹² Application, Declaration of David L. Teitzel, “State of Local Exchange Competition Track A and Public Interest Requirements,” p. 21, 23.

¹³ *Id.* “Total Lines Versus Lines in Collocation Wire Centers in Qwest Servicing Areas (as of October 31, 2002),” p. 47. In New Mexico, Qwest had 593,440 residential access lines.

¹⁴ *Id.* In Oregon, Qwest had 924,890 residential access lines as of October 31, 2002. Qwest estimated that CLECs had 10,666 residential lines based on E-911 listings (p. 33), and 6,055 resold access lines (p. 41). In addition, there were 3,411 UNE-P lines (Res in Listing Database). Exhibit DLT-TRACK A/PI-OR-1, page 4 of 16.

high-priced. Thus, CLECs will be unlikely to invest in residential services in the future, and their market share is unlikely to grow.

The Commission has repeatedly stated that “factors beyond the control of the BOC, such as individual competitive LEC entry strategies, can explain low levels of residential competition.”¹⁵ However, small CLEC residential market shares are the norm, not the exception. Clearly, the reluctance of CLECs across the nation to enter the residential market is evidence of a widespread, systemic problem with the development of residential competition which cannot be explained away by “competitive LEC entry strategies.” Rather, the miniscule market shares indicate that factors within the BOCs’ control are preventing the full and irreversible entry of CLECs into the residential market.

V. QWEST’S ESTIMATION OF COMPETITIVE LINES INCLUDES DATA PRODUCTS AND ONE-WAY LINES WHICH ARE IRRELEVANT TO THE PUBLIC INTEREST ANALYSIS AND ARE OTHERWISE IMPROPERLY INFLATED (PUBLIC INTEREST)

In support of its public interest argument, Qwest estimates the percentage of local competition in the three states. Sprint believes that Qwest’s methodology improperly inflates the CLECs’ line estimates by including CLECs’ high speed data lines and local lines which are not used for competitive local service and by attributing too many lines to competitors based on LIS trunks.

As of the date of this Application, Sprint did not compete with Qwest for local voice telephone service in any of the three states. Nevertheless, Qwest attributes

¹⁵ See, e.g., *Application by Verizon New Jersey Inc., Bell Atlantic Communications, Inc (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189, at para. 168 (rel. June 24, 2002).

competitive access lines to Sprint in these states. In its “Wholesale Volumes Data Report Summary,” Qwest attributes facilities to Sprint Communications Company LP, as well as Sprintdata and Sprintnet.¹⁶ Qwest also attributes ported telephone numbers to Sprint Communications Company LP. (*id.*), and Qwest lists Sprint Communications Company L.P. as an active CLEC. *Id.*, Exhibit DLT-TRACK A/PI-NM-3.

Sprint suspects that the facilities are actually one-way Dial IP lines used to access IP providers and some DSL lines. While Dial IP and DSL are niche markets that Sprint values highly, they are not substitutes for local exchange service, the market over which Qwest retains control and which is the market at issue here. To the extent that the market share information provided by Qwest reflects data services, it improperly overstates the relevant CLEC market share.

Concerning the LIS trunks in service, Qwest does not know how carriers use their interconnection trunks, and it should not be permitted to rely on estimates based on such trunks to demonstrate entry into the local exchange market. Sprint uses its LIS trunks primarily for its Dial IP service, which is not the relevant market.

Because Sprint did not provide competitive telephone exchange service in any of Qwest’s states on the date of the Application, all access lines attributed to Sprint should be removed from Mr. Teitzel’s competitive analysis. Sprint cannot know what the true market share of competitive carriers is in the states here at issue. However, Qwest’s gross misuse of Sprint data certainly supports an inference that Qwest has similarly misused data relating to other competitive carriers as well.

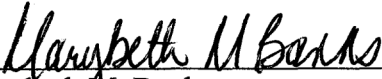
¹⁶ Declaration of David Teitzel, Exhibits DLT-TRACK A/PI-NM-1, DLT-TRACK A/PI-OR-1 and DLT-TRACK A/PI-SD-1.

VI. CONCLUSION

Because Qwest has failed to demonstrate that there is meaningful competition in the states here at issue, its application for § 271 relief should be denied.

Respectfully submitted,

Sprint Communications Company L.P.

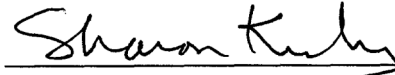


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CERTIFICATE OF SERVICE

I hereby certify that a copy of Sprint's Comments in the Matter of Application by Qwest Communications International Inc. for Authorization to Provide In-Region, InterLATA Services in New Mexico, Oregon and South Dakota, WC Docket No. 03-11, was sent electronically and/or by U.S. First Class Mail on this 5th day of February 2003 to the parties listed below.


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